Office Supreme Court U.S.
FILED
DEC 8 1902
JAMES H. McKENNEY,
Clerk.

No. 17.

Sup. Ct. Bk. of Pratt v Sanders for D. C.

Filed Dec. 8, 1902.

Supreme Court of the United States.

Louisville and Jeffersonville Ferry Company,

Plaintiff in Error.

VERSUS

Commonwealth of Kentucky.

Defendant in Error.

IN ERROR TO THE COURT OF APPEALS TO THE STATE OF KENTUCKY.

BRIEF FOR DEFENDANT IN ERROR.

CLIFTON J. PRATT, Attorney General,
D. W. SANDERS,
Attorneys for Defendant in Error.

Supreme Court of the United States.

LOUISVILLE AND JEFFERSONVILLE FERRY CO.
PLAINTIFF IN ERROR,

versus

COMMONWEALTH OF KENTUCKY.
DEFENDANT IN ERROR.

SUPPLEMENTAL BRIEF FOR DEFENDANT IN ERROR.

The tax sought to be recovered by the Commonwealth of Kentucky from the Louisville and Jeffersonville Ferry Company, is a tax on the corporate franchise of the plaintiff in error, measured by its net earnings. Its net earnings, or income, is resorted to simply as a just measure of the tax to be paid for the enjoyment of its corporate franchise.

It has been repeatedly held in the decisions of this Court, that "The privileges and franchises of a private corporation, unless exempted in terms which amount to a contract, are as much legitimate subjects of taxation as any other property of the citizen which enjoys the protection and is within the control of the sovereign power of the State." And it has also been decided that "Corporate franchises are legal estates, and not mere naked pow-

ers; but powers coupled with an interest, which vest in the corporation by virtue of their charter."

It has been adjudged by this Court that in the taxation of deposits of savings banks in which there is no capital stock, that investments made by the savings bank in securities of the United States, declared by Congress, in the Act which authorized their issue, to be exempt from taxation by State authority, does not exempt the society from taxation to the extent of the deposit so invested.

Society for Savings v. Coite, 6 Wallace, 595.
Provident Institution v. Massachusetts, 6 Wallace, 611.
Hamilton Co. v. Massachusetts, 6 Wallace, 632.

The subject matter to be taxed is the corporation, and its net earnings within the period named in the taxing statute of Kentucky, are simply the basis of computing the amount.

As was said by Mr. Justice Strong, in State Tax on Railway Gross Receipts, 15. Wallace, 294:

"The tax is laid upon the gross receipts of the "company; laid upon a fund which has become the "property of the company, mingled with its other "property, and possibly expended in improve- "ments or put out at interest. The statute does

"not look beyond the corporation to those who "may have contributed to its treasury. The tax is "not levied, and, indeed, such a tax cannot be, "until the expiration of each half year, and until "the money received from freights and other "sources of income has actually come into the "company's hands. Then it has lost its distinctive "character as freight earned, by having become in- "corporated into the general mass of the com- "pany's property. While it must be conceded "that a tax upon inter-state transportation is in- "valid, there seems to be no stronger reason for "denying the power of a State to tax the fruits of "such transportation, after they have become in- "termingled with the general property of the car- "rier, than there is for denying the power to tax "goods which have been imported, after their orig- "inal packages have been broken, and after they "have been mixed with the mass of personal prop- "erty in the country. Thus, in Brown v. Mary- "land, where it was ruled that a State tax cannot "be levied by the requisition of a license upon im- "porters of foreign goods by the bale or package, "or upon other persons selling the same by the bale "or package, Chief Justice Marshall, considering "the dividing line between the prohibition upon the "States against taxing importers and their general "power to tax persons and property within their "limits, said that 'When the importer has so acted "upon the thing imported that it becomes incor- "porated and mixed up with the mass of property

"in the country, it has perhaps lost its distinctive "character as an import, and has become subject to "the taxing power of the State.' This distinction "in the liabilities of property in its different stages, "has ever since been recognized. It is most impor- "tant to the States that it should be. And yet, if "the States may tax, at pleasure, imported goods "so soon as the importer has broken the original "packages and made the first sale, it is obvious a "tax will obstruct importations quite as much as "would an equal impost upon the unbroken pack- "ages before they had gone into the markets; and "this is so, although no discrimination be made.

"There certainly is a line which separates that "power of the federal government to regulate "commerce among the States, which is exclusive, "from the authority of the States to tax person's "property, business or occupation within their lim- "its. This line is sometimes difficult to define with "distinctness. It is so in the present case; but we "think it may safely be laid down, that the gross "receipts of railroad or canal companies, after they "have reached the treasury of the carriers, al- "though they may have been derived in part from "transportation of freight between the states have "become subject to legitimate taxation. It is not "denied that net earnings of such corporations are "taxable by State authority, without any inquiry "after their source, and it is difficult to state any "well founded distinction between the lawfulness "of a tax upon them and that of a tax upon gross

"receipts, or between the effects they work upon "commerce, except perhaps in degree. They may "both come from the charges made for transport- "ing freight or passengers between the States, or "out of the exactions from the freight itself. Net "earnings are a part of the gross receipts.

"There is another view of this case to which "brief reference may be made. It is not to be "questioned that the States may tax the franchises "of companies created by them, and that the tax "may be proportioned either to the value of the "franchise granted or to the extent of its exercise; "nor is it deniable that gross receipts may be a "measure of approximate value, or, in fact, laid "upon the companies.

"Such a measure imposes no greater burden upon "any freight or business from which the receipts "come than would be an equal tax laid upon the di- "rect valuation of the franchises. In both cases "the necessity for higher charges to meet the ex- "actions is the same.

"Influenced by these considerations, we hold that "the act of the legislature of the State, imposing a "tax upon the plaintiff in error equal to three- "fourths of one per cent. of their gross receipts, is "not invalid, because in conflict with the power of "Congress to regulate commerce among the States. "And under the decision made in Woodruff v. "Parham, it is not invalid, because it lays an import "or duty on imports or exports."

The principle established by the foregoing decis-

ions of this Court, was followed by the Supreme Court of Pennsylvania in Philacelphia Contributions for Insurance v. Commonwealth, 98 Penna. State, 48. In the opinion of that Court, delivered by Judge Sterrett, it is said:

"The interest received by the Company on the "bonds undoutedly fromed a part of its income, and "while the bonds themselves are exempt from taxation, "by virtue of the law under which each class respective-"ly was issued, it does not follow that the same immun-"ity adheres to the money paid from time to time in dis-"charge of the interest due on the securities. When so "paid, it loses the non-taxable characteristic of the bonds "on which it accrues, and should thence-forth be treat-"ed as any other species of income, derived from other "sources. But, as already intimated, the tax is not "laid on the money and other receipts of the company.

"There is an obvious difference between a direct "tax on the property of the corporation and a fran-"chise tax measured by its earnings, which, approxi-"mately, at least, represent either the value of the "franchise granted; or the extent of its exercises.

"This distinction has been repeatedly recognized "by both Federal and State Courts."

This Court, in Home Insurance Company v. New York State, 134 U. S., 594, in an elaborate opinion delivered by Mr. Justice Field, again examined the questions heretofore adjudged by this Court in the authorities above cited, upon a law imposed by the State of New York upon the corporate franchises or business of all corporations incorporated under the law of the state, or of any other state or country, and

doing business within the state, and its value to be ascertained by the extent of dividends declared by the corporation in the current year, and held that the validity of a state tax upon corporations created under the laws of New York, or doing business within its territory, can in no way be dependant upon the mode which the state may deem fit to adopt in fixing the amount for any year, which it will exact for the franchse. The court said:

"By the term 'corporate franchise or business,' as "here used, we understand is meant (not referring "to corporations sole, which are not usually created "for commercial business), the right or privilege given "by the State to two or more persons of being a cor- "poration—that is, of doing business in a corporate "capacity, and not a privilege or franchise, which, "when incorporated, the company may exercise. The "right or privilege to be a corporation, or to do busi- "ness as such body, is one generally deemed of value "to the corporators, or it would not be sought in such "numbers as at present. It is a right or privilege by "which several individuals may unite themselves under "a common name and act as a single person, with a "succession of members, without dissolution or sus- "pension of business, and with a limited individual "liability. The granting of such right or privilege "rests entirely in the discretion of the State and when "granted, it may be accompanied with such condi- "tions as its legislature may judge most befitting to "its interest and policy. It may require, as a condi- "tion of the grant of the franchise, and also of its

"continued exercise of the corporate power, a specific "sum to the State each year, or month, or a specific "portion of its gross receips, or of the profits of its "business; or a sum to be ascertained in any conven- "ient mode it may prescribe. The validity of the tax "can in no way be dependent upon the mode which "the State may deem fit to adopt in fixing the amount "for any year, which it will exact for the franchise. "No constitutional objection lies in the way of the "legislative body prescribing any mode of measure- "ment, to determine the amount it will charge for the "privileges it will bestow. It may well seek, in this "way, to increase its revenue to the extent which it "has been cut off by exemption of such property "from taxation; as its revenues to meet its expenses "are lessened in one direction, it may look to any "other property or source of revenue which is not ex- "empted from taxation. Its action in this matter is "not the subject of judicisl inquiry in a Federal tri- "bunal. As was said in the Delaware Railroad tax "case, 18 Wallace, 206 231, 'The State may impose "a tax upon the corporation as an entity existing un- "der its laws, as well as upon the capital stock of the "corporation, or its separate corporate property; and "and the manner in which its value shall be assessed, "and the rate of taxation, however arbitrary or capric- "ous, are mere matters of legislative discretion. It is "not for us to suggest in any case, that a more equit- "able mode of assessment or rate of taxation might "have been adopted, than the one prescribed by the

"legislature of the State. All else lies beyond our "jurisdiction.'

"It is true, as said by this Court in California v. "Pacific Railroad Company, 127 U. S., 141. that the "taxation of a corporate franchise has no limitation "but the discretion of the taxing power; and its value "is not measured like that of property, but may be "fixed at any sum that the legislature may choose. It "may be arbitrarily laid, without any valuation upon "the franchise. If any hardship or oppression is cre- "ated by the amount exacted, the remedy must be "sought by appeal to the legislature of the state; it "cannot be furnished by Federal tribunals.

"The tax in the present case could not be affected "if the nature of the property in which the whole "capital stock is invested, were changed and put into real property or bonds of New York or of other "States. From the very nature of the tax being laid "upon a franchise given by the State and revokable "at pleasure, it cannot be affected in any way by the "character of the property in which its capital stock "is invested. The power of the State over the cor- "porate franchise and the condition upon which it shall "be exercised is as ample and plenary in the one case "as in the other."

The principle announced in the foregoing cases was followed by the New Jersey Courts in Honduras v. the Board of Assessors, 54 New Jersey Law, 283; S. C. 23 Atlantic, 970, snstaining a tax laid on a franchise of a domestic corporation engaged in foreign commerce. See also,

Rose's Notes on Home Insurance Co.; New Notes of tne U. S. Reports, Vol. II, 957 and 958.
Burroughs on Raxatioe, 168.
Desty on Taxation, Vol. I, 361.
Cooley on Taxation, 135-137.
New York State v. Toberts, 171 U. S., 658.

CLIFTON J. PRRTT,
Attorney-General.
D. W. SANDERS,
Attorneys for Defendant in Error.